BHANU SEKARAMANI

v.

NAGAMMA KUPPUSAMY

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[DIVORCE PETITION NO. S7-47-290 OF 1988]
10 JANUARY 1991

FAMILY LAW: *Divorce - Irretrievably broken down - Duty of Court to inquire into the facts of the case - Separation - Rebuttable - Gross misbehaviour - Desertion per se - Standard of behaviour test - Law Reform (Marriage and Divorce) Act 1976, ss. 53(1), 54(1), (2).*

The husband petitioner H instituted a divorce petition to dissolve the marriage solely on the ground that both parties had been living apart continuously for more than 2 years, that reconciliation attempts had failed and that marriage had therefore broken down irretrievably.

The wife in her answer and her affidavits denied that they lived apart continuously and believed that the husband had been committing adultery. She asked that the husband's petition be dismissed.

The Court examined s. 53 of the Law Reform (Marriage and Divorce) Act 1976 (the Act) to inquire into the facts of continuous separation and the degree of proof needed to determine irretrievable breakdown of a marriage, the effect of desertion and the test to determine whether a person can reasonably be expected to live with their spouse.

Held:

[1] It is clear from subs (1) of s. 53 of the Act that the Court should have regard to the fact that the parties to a divorce petition have been separated for at least 2 years prior to the filing of the divorce petition. But the 2 year separation is only *prima facie* proof of the breakdown of the marriage. Under s. 54(2) of the Act, this is rebuttable when the respondent can show that the 2 year seperation *per se* does not cause or lead to the breakdown of the marriage.

[2] It is only under para. (c) of s. 54(1) of the Act that a petitioner stands on firmer ground to get a decree when he or she can show that the respondent has without reasonable cause deserted the petitioner for a period of 2 years prior to the filing of the divorce petition. Even the desertion *per se* is again only *prima facie* proof of the fact that the marriage has broken down irretrievably; it is not conclusive but rebuttable.

[3] The standard of the behaviour of the respondent which warrants the petitioner to say that he cannot reasonably be expected to live with the respondent is not whether he is tired of the respondent, or fed up with her, but whether she cannot reasonably be expected to live with him.

[4] From a scrunity of the evidence, it was found that it was H who deserted W;

[5] Applying the principles in *Katz v. Katz* and *Kisala v. Kisala*, it was for the Court to decide that one party cannot be expected to live with the other and that it would not be allowable for the Court to dissolve a marriage simply because of one party's disinclination and boredom with the other party.

[6] In light of the principles, above H's complaints about the wife were trivialities - he wanted the marriage to be dissolved to enable him to forge a closer relationship with his other lady friends. In the circumstances, the marriage had not irretrievably broken down.

[H's petition dismissed.]

Cases referred to:
Hariram Jayaram v. Saraswathy Rajahram [1990] 2 CLJ (Rep) 103
Stringfellow v. Stringfellow [1976] All ER 539
Katz v. Katz [1972] 1 WLR 955
Kisala v. Kisala [1973] Vol 177 SJ 665

Legislation referred to:
Divorce Reform Act 1969 [UK] s. 2(3)
Law Reform (Marriage and Divorce) Act 1976, ss. 27, 53(1), 54(1), (2)
Matrimonial Causes Act 1973 [UK], s. 1(2)(b)

For the Petitioner - T. Santhakumari; M/s. Seelan & Santha
For the Respondent - Rita Reddy; M/s. Rita R. Reddy & Associates

JUDGMENT

Lim Beng Choon J:

The husband petitioner and the wife respondent (hereinafter referred to as 'the husband' and 'the wife' respectively) were married on 27 September 1984, and the marriage was registered under s. 27 of the Law Reform (Marriage and Divorce) Act 1976 at the Registry of Civil Marriage Gombak, Selangor Darul Ehsan. There are no children of the marriage.

On 19 April 1988, the husband instituted this Divorce Petition to dissolve the marriage solely on the ground that the husband and wife have been living apart continuously for more than two years sometime since October 1984 until the presentation of this petition and that reconciliation attempts made between the husband and the wife at the Marriage Tribunal Petaling Jaya had not been successful. Hence the husband claims that the marriage has broken down irretrievably. In his petition the husband said that after the marriage and before he left his wife both the parties lived and cohabited at No.12 Jalan 1B, Selayang Baru, Batu Caves, Selangor. I take it that the house where the parties lived is the matrimonial home. He also said in his petition that after the husband had left the wife, the latter was and is still staying at the matrimonial home.

In opposing the husband's petition, the wife filed her answer on 27 September 1988. She denied that the parties had been living apart for a continuous period of two years or since October 1984. She averred that she conceived a child of the husband on or about March 1985 but suffered a miscarriage at the end of July 1985 when she was hospitalised at the General Hospital Kuala Lumpur until the 3 August 1985. The husband had visited her at the said hospital. Prior to the miscarriage she was working as a factory hand in a furniture factory for a salary of RM.150 per month and she had to stop working due to the miscarriage. The place where the parties stayed was a squatter house which they shared with 10 other people. In 1985, the exact date of which she could not remember, the wife found the photograph of a lady in the husband's diary. The husband quickly grabbed the photograph off her hand of the wife. She believed that the husband had been committing adultery with the unknown woman and from October 1985 the husband had intermittenly lived with the said woman and his own wife. On 2 September 1988, the husband visited the wife and took her out to a hotel and had sexual relationship with her since it was not convenient to do so in the house with 10 other people. The wife therefore asked that the husband's petition for divorce be dismissed with cost.

The wife filed an affidavit affirmed by her on 27 September 1988, to support her application for maintenance. In her affidavit in which she reiterated substantially what she said in her answer, she stressed that the husband and she lived together in the squatter area until October 1985, when he left her to live with the unknown woman. However that may be the husband still came to be with her intermittently.

In his affidavit in reply affirmed by him on 27 September 1989, the husband did not dispute any of the allegations made by the wife in her answer and her affidavit of 27 September 1988. In the said affidavit in reply he merely set out the amount he received as his monthly salary and his monthly expenditure to counter the wife's claim for maintenance.

In dealing with the case of *Hariram Jayaram and Saraswathy Rajahram* reported in [1990] 2 CLJ (Rep) 103 at 108 I had in passing suggested (without deciding) that in considering a petition of divorce, the Court was required pursuant to s. 53(1) of the Law Reform (Marriage and Divorce) Act 1976 (the Law Reform Act) to enquire into the facts alleged as causing or leading to the breakdown of the marriage. I must admit that what I had said is not quite correct because what s. 53(1) provides is that in its inquiry into the facts and circumstances alleged as causing or leading to the breakdown of the marriage, the Court will have regard to one or more of the facts stipulated in that section and one of the stipulated facts is

> that the parties to the marriage have lived apart for a continuous period of at least two years immediately preceding the presentation of the petition.

It is clear from subsection (1) of s. 53 of the Law Reform Act that the Court should have regard to the fact that the parties to a divorce petition have been separated for at least 2 years prior to the filing of the divorce petition. But the 2 year separation is only *prima facie* proof of the breakdown of the marriage. It is rebuttable when the respondent can show that the 2 year separation *per se* does not cause or lead to the breakdown of the marriage. This is so because of the following wordings of subs. (2) of s. 54 of the Law Reform Act relevant to the present case enjoins the Court that:

> in considering whether it would be just and reasonable to make a decree the Court shall consider all the circumstances, including the conduct of the parties ... and that if it should appear to the Court that in all circumstances it would be wrong to dissolve the marriage it shall dismiss the petition."

I have had an occasion to raise these propositions when I dealt with the case of *Tan Keok Yin v. Cheah Sew Hong Kuala Lumpur* High Court Divorce Petition No. S7-47-796-1987. Furthermore under para. (a) and (b) of s. 54(1) of the Law Reform Act the commission of adultery by the respondent or gross misbehaviour on the part of the respondent is not *per se* sufficient ground for a divorce simply because the respondent may be able to show that the petitioner has condoned the adultery or misbehaviour and the Court must consider the conduct and circumstances of the case to see whether it is justifiable to grant a decree. It is only under para. (c) of s. 54(1) of the Law Reform Act that a petitioner stands on firmer ground to get a decree when he or she can show that the respondent has without reasonable cause deserted the petitioner for a period of 2 years prior to the filing of the divorce petition. Even then desertion *per se* is again only *prima facie* proof of the fact that the marriage has broken down irretrievably; it is not conclusive but rebuttable. The scope of para. (c) of s. 54(1) is similar to s. 1(2)(b) of the English Matrimonial Causes Act 1973 and the scope of the English pertinent statutory provisions has been dealt with in *Stringfellow v. Stringfellow* [1976] All ER 539 where it was held that desertion *per se* without more is not good ground to assert that a marriage has irretrievably broken down.

On the pleadings of the parties, I would be fully satisfied in holding that the husband had failed to make out a case that the marriage has irretrievably broken down. However as the matter had gone on trial and both parties chose to give oral I must scrutinise the evidence as a whole in order to find out whether the marriage indeed has irretrievably broken down.

It is important to note that in his oral evidence the husband gave two grounds to support his allegation that the marriage had broken down irretrievably namely (i) that the wife refused to stay with him or stay in his parents' house and (ii) the wife scolded him and showed disrespect to him. I am inclined to hold that these two grounds are not true and even if they were true it would not be sufficient to justify that the marriage has been irretrievably broken down. I say for the reasons as adumberated below.

From my scrutiny of the evidence as a whole I find as a fact that firstly the marriage was not a match-making or arranged marriage by the parents of the husband or anybody. It was, if I may use the phrase, "a love-match" marriage. Indeed the parties had been staying together for some time before they registered the marriage without the knowledge of the husband's parents. That being the case it is incredible that the husband's love for his wife could have worn off within three months causing the husband to leave the wife in the matrimonial home. The reasons given by the husband in his evidence in his examination-in-chief were that the wife "refused to come back with me (the husband) or follow me to my parents' house at Carey Island." He also said that the wife chose to stay in Selayang Batu Caves and that she never showed any respect for him but instead she scolded him. It is to be noted that the husband did not explain in what way did the wife fail to show any respect for him; he merely said that his wife scolded him and even then he did not say why and how often did such scolding take place. Arguments, scoldings and even quarrellings are no doubt negative attributes of any ordinary marriage life and such negative attributes are not by themselves sufficient to allege that it is intolerable to live with the wife. As regards to the wife's refusal to follow him the husband alleged (it should be observed) in the petition that after the marriage the couple lived and cohabited at No.12, Jalan B, Selayang Baru, Batu caves, Selangor and it was also said in the petition that at the time of filing of the divorce petition the wife still stayed at the same address which, as I have earlier said, was the matrimonial home. That being the case I find as a fact that it is not that the wife who refused to follow the husband but rather the husband deserted the wife and left her staying by herself at the matrimonial home.

Secondly from the way the wife gave her evidence in a simple and straightforward way and the quality of her evidence, it is more probable that the husband was staying with her until October 1985 in the matrimonial home. She conceived a child of the husband in March 1985 but had a miscarriage towards end of July 1985 when she had to be hospitalised. The husband visited her at the hospital. After her discharge from the hospital the husband then left her in October 1985 without making any effort even to pay the hospital charges. The reason for leaving the wife was reasonably explained by the wife's evidence where she said that in 1985 she happened to find the photograph of an unknown woman in the husband's diary. The husband quickly grabbed the photograph off the hand of the wife. There is no doubt in my mind that it was the discovery of this photograph that the husband made up his mind to desert the wife in order to be free to forge a closer relationship if not with the particular unknown woman at least with other women. This proposition is corroborated by what the husband said in his evidence given under cross examination. He was asked by Counsel for the wife whether he had had any other women friends. His answer was that he had many friends meaning that he had many women friends although he denied that he had

a a special girl friend. The wife denied that the husband had wanted her to leave the matrimonial home. She asserted that even after leaving her in October 1985 the husband still come back to the matrimonial home to see her and stayed with her. On one occasion in 1988 the husband took the wife to a hotel to have sexual relationship with her. Her explanation that the husband took her to the hotel to have sexual relationship with her was that it was inconvenient to do so in the matrimonial home where the couple shared with 10 persons. Such an explanation b cannot be said to be incredible.

The standard to the behaviour of the respondent which warrants the petitioner to say that he cannot reasonably be expected to live with the respondent has been illustrated in the case of *Katz v. Katz* [1972] 1 WLR 955 at 960.

> The standard is that he must behave "in such a way that the petitioner cannot reasonably c be expected to live with (him)." That is the test. It is for the Judge not the petitioner alone to decide whether the behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the petitioner to endure it, to live with the respondent. Also it is for the Judge to say whether the marriage has irretrievably broken down. To that extent I agree with what Bagnall J said in *Ash v. Ash* [1972] Fam. 135. **The Court must consider the effect of the behaviour on the particular petitioner and ask the question is it established, not that she is tired of the respondent, or, colloquially, fed up with him,** d **but that she cannot reasonably be expected to live with him.** In a sense it seems to me wrong to call it, as we are apt to do, unreasonable behaviour. It is behaviour that causes the Court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live him. (Emphasis is mine).

Again in *Kisala v. Kisala* [1973] Vol 177 SJ 665 Bagnall J said:

> e when a respondent desired to plead that the marriage had not broken down irretrievably the common form denial of the petition did not achieve sufficient clarity. It was desirable where a respondent sought to rely on s. 2(3) of the Divorce Reform Act 1969 that submission together with particulars of the positive case in support of that submission should be made in the answer. The wife's complaints about the husband were mere trivialities. Despite the reform of the divorce law it was not allowable for the Court to dissolve a marriage simply because of one party's disinclination and boredom with the marriage. Petition dismissed.

f In applying the principles laid down in the two cases cited above I am satisfied that the husband's complaints about the wife were trivialities. To my mind he wants the marriage to be dissolved not because of any misbehaviour on the part of the wife but rather because he is tired of the wife and bored and he wants to be free so that he can forge a closer relationship with the unknown woman or his other lady friends. Under the circumstances I do not think that the marriage has been irretrievably broken down. There is good prospect that the husband g may, after reconsidering the matter, return to the wife. The petition for divorce is therefore dismissed with costs.

Also found at [1991] 2 CLJ 1356

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